UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **TIMOTHY JAMES WYLIE** and **HEATHER ERIN WYLIE**, Debtors.	Case No. **05-61135-7**

MEMORANDUM of DECISION

At Butte in said District this 7th day of December, 2005.

In this Chapter 7 bankruptcy, after due notice, a hearing was held November 15, 2005, in Butte on the Motion for Reconsideration of Claims Under F.R.B.P. 3008 filed by United Student Aid Funds, Inc./Sallie Mae ("USAF") on September 20, 2005, together with Debtors' objection thereto. Attorney Daniel R. Sweeney appeared at the hearing on behalf of Debtors and attorney Lewis Smith appeared on behalf of USAF. Debtor Heather Wylie and Ruth Hankins testified and Exhibits 1 through 8 and 11 were admitted into evidence without objection. The admission of Exhibits 9 and 10 was denied. At the conclusion of the hearing, the Court took the matter under advisement. This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

Procedurally, Debtors filed on August 4, 2005, an Objection to Proof of Claim No. 8 filed by USAF on May 20, 2005. Debtors' Objection was filed in accordance with Mont. LBR 3007-2, which provides: "A trustee, debtor or other party in interest may file an objection to a creditor's proof of claim in accordance with F.R.B.P. 3007, by using Mont. LBF 28." As

required by Mont. LBF 28, Debtors' Objection included a "NOTICE" provision advising USAF that it had ten (10) days to respond to Debtors' Objection and schedule the matter for hearing. Debtors' "NOTICE" further provided that "[i]f no objections are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted." Debtors served their Objection on USAF at the address set forth on USAF's Proof of Claim.

USAF failed to timely file a written response or request for hearing on Debtors' Objection. Under this Court's Local Rules, USAF's failure to respond is deemed an admission by USAF and/or its counsel that the averments set forth in Debtors' Objection are well taken and that the Objection should be sustained without further notice or hearing. Notwithstanding this Court's Local Rule, because Debtors were attempting to reduce USAF's claim from $8,617.66, as set forth on Proof of Claim No. 8, to $860.48, the Court deemed it appropriate to set Debtors' Objection for hearing. Accordingly, the Court entered a Notice of Hearing on August 24, 2005, setting the matter for hearing on September 6, 2005. The Notice of Hearing was served upon USAF at the address set forth on Proof of Claim No. 8.

Debtor Heather Erin Wylie appeared with counsel at the September 6, 2005, hearing and testified. Additionally, Exhibits A, B, C and D were admitted into evidence without objection. No appearance was made by or on behalf of USAF at the September 6, 2005, hearing. After considering Debtor's uncontroverted testimony and the Exhibits, the Court entered an Order on September 6, 2005, sustaining Debtors' Objection.

Subsequently, on September 20, 2005, USAF filed the Motion for Reconsideration of Claims Under F.R.B.P. 3008 that is now before the Court and which was the subject of the

hearing held November 15, 2005. Ruth Hankins, a litigation assistant with Sallie Mae, testified that USAF received Debtor's Objection to Proof of Claim No. 8 filed August 4, 2005. Counsel for USAF explained that USAF sent Debtor's counsel a letter indicating that they disagreed with the Objection. However, USAF did not file a response to Debtors' Objection because USAF's experience in other jurisdictions was that issues of whether a student loan is dischargeable is properly dealt with through an adversary proceeding. USAF did not receive notice of an adversary proceeding, and thus elected not to respond to Debtors' Objection.

Even though USAF acknowledged receipt of Debtors' Objection, Ruth testified that she did not have a copy of the Court's Notice of Hearing in her file. Ruth did a company search for the Notice of Hearing, but could not locate the Notice. The Certificate of Service attached to the Notice of Hearing reflects that the Notice was served upon USAF at the address set forth on Proof of Claim No. 8, and the Notice has not been returned to the Court as unclaimed or undeliverable.

USAF seeks reconsideration of the Court's September 6, 2005, Order under Rule 3008, F.R.B.P. Rule 3008 provides:

> A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

The above Rule must be read in conjunction with 11 U.S.C. § 502(j) which reads in part: "A claim that has been allowed or disallowed may be reconsidered for cause."

In *In re Resources Reclamation Corp. of America*, 34 B.R. 771,773 (9th Cir. BAP 1983), the Ninth Circuit Bankruptcy Appellate Panel ("BAP") examined the predecessor to Rule 3008, namely Bankruptcy Rule 307, in the context of § 502(j) and determined that Fed.R.Civ.P 60(b)

provided the proper basis for reconsideration of a previously disallowed claim. *See also In re Levoy*, 182 B.R. 827, 832 (9th Cir. BAP 1995) ("There is no time limit for bringing a Rule 3008 motion. We have held that where the motion is filed after ten days following the entry of the order, it is properly treated as a motion to vacate pursuant to Fed.R.Civ.P. 60(b), made applicable by Fed.R.Bankr.P. 9024. *In re Cleanmaster Indus., Inc.*, 106 B.R. 628, 630 (9th Cir. BAP 1989).").

The BAP in *In re Resources Reclamation Corp. of America* proceeded to discuss the factors of what it termed the "liberal rule of excusable neglect":

> (1) whether granting delay will prejudice debtor or other creditors;
>
> (2) the length of the delay and its impact on efficient court administration;
>
> (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform;
>
> (4) whether the creditor acted in good faith;
>
> (5) whether clients should be penalized for their counsel's mistake or neglect; and
>
> (6) whether the claimant has a meritorious claim.

Id. at 773-74.

Other courts have rejected the BAP's excusable neglect requirement, and have instead applied the less stringent "for cause" standard:

> [T]he Fourth Circuit has made clear that "excusable neglect" and "cause" are different concepts. *See Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530 (4th Cir.1996). The court found that the "good cause" standard applies to motions for an extension of time to file a notice of appeal which are filed within the time period for filing the notice and that motions to extend time for filing a notice of appeal filed after the time limit for filing the notice are considered under the more stringent "excusable neglect" standard. *Id*. The Supreme Court somewhat corroborated this notion, stating "at least for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with

> a filing deadline is attributable to negligence." *Pioneer Investment Services*, 507 U.S. at 394, 113 S.Ct. at 1497. Shawsville's motion for reconsideration was not filed past a deadline, and the language of Bankruptcy Code § 502(j) indicates that a disallowed claim "may be reconsidered *for cause*." (Emphasis added). Therefore, it appears that the motion for reconsideration should be considered under a "for cause" standard rather than under the more difficult "excusable neglect" standard.

Cassell v. Shawsville Farm Supply, Inc., 208 B.R. 380, 383 (W.D.Va. 1996).

While decisions of the BAP are not controlling authority, they do provide instructive guidance. Nevertheless, this Court need not decide which standard is appropriate today for this Court finds that USAF has failed to satisfy the more stringent requirements of Rule 60(b), which implicitly encompass the "for cause" standard.

Rule 60(b),[1] F.R.Civ.P., provides relief for such items as mistake, inadvertence, excusable neglect, newly discovered evidence and fraud. The provisions of Rule 60(b) set forth in subsections (2) through (5) are by their plain terms, not applicable to this proceeding–USAF does not claim that it has newly discovered evidence; that its claimed was reduced as a result of fraud, misrepresentation or misconduct; that the Court's Order disallowing its claim is void; or that the Order has been satisfied or is based on an order that has been reversed or otherwise vacated.

---

[1] Rule 60(b) provides:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Thus, the only other applicable provisions are Rule 60(b)(1) and (6).

Under Rule 60(b)(1), a court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. Courts, however, will not grant relief under 60(b)(1) except in very limited circumstances, such as the attorney's death or the diagnosis of a debilitating medical condition. *See, e.g., United States v. Cirami*, 563 F.2d 26, 34 (2nd Cir. 1977) (attorney's psychological disorder caused professional negligence); *Vindigni v. Meyer*, 441 F.2d 376, 377 (2nd Cir. 1971) (counsel no longer attending to practice and reportedly had "disappeared"). As the Ninth Circuit Court of Appeals has cautioned:

> Counsel for litigants...cannot decide when they wish to appear, or when they will file those papers required in a lawsuit. Chaos would result.... There must be some obedience to the rules of the court; and some respect shown to the convenience and rights of other counsel, litigants, and the court itself.

Smith v. Stone, 308 F.2d 15, 18 (9th Cir. 1962) (lawyer's failure to follow court rules not "excusable neglect" under Rule 60(b)).

Rule 60(b)(6), on the other hand:

> [D]oes not particularize the factors that justify relief, but we have previously noted that it provides courts with authority "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott v. United States*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949), while also cautioning that it should only be applied in "extraordinary circumstances," *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 863-64, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988).
>
> Following the admonitions of the Supreme Court, we have used Rule 60(b)(6) "sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir* Co., 984 F.2d 1047, 1049 (9th Cir.), *cert. denied*, 510 U.S. 813, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993). "The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Id.*

United States v. State of Washington, et al., 98 F.3d 1159, 1163 (9th Cir. 1996).

"Relief under Rule 60(b) requires a party to show 'extraordinary circumstances,' suggesting that the party is faultless in the delay." *Pioneer Inv. Services, Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993). Such relief "normally will not be granted unless the moving party is able to show both injury and that the circumstances beyond its control prevented timely action to protect its interests." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993) *cert. denied*, 510 U.S. 813,114 S.Ct. 60, 126 L.Ed.2d 29 (1993); *see also Ben Sager Chemicals Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977) (holding that Rule 60(b) movant must demonstrate the presence of "'a meritorious defense and that arguably one of the four conditions for relief applies–mistake, inadvertence, surprise or excusable neglect'").

In the instant case, the Court finds that USAF has not provided any reasonable explanation for its failure to respond to Debtors' Objection to Claim nor has USAF properly explained its failure to appear at the hearing on Debtors' Objection to Claim held September 6, 2005. First, Debtors' objection went to the amount of USAF's claim and not to whether the claim was dischargeable. Thus, the Court is not persuaded by USAF's assertion that it was waiting for an adversary complaint. As explained in *In re State Line Hotel, Inc.*, 323 B.R. 703, 713 (9th Cir. BAP 2005):

> *Levoy* holds, 182 B.R. at 834, that Rule 9014 applies to objections to claims. We do not disagree with that statement, but, as set out above, conclude that Rule 9014 defers to Rule 3007 on the subject of claims objections: it calls for an objection, not a motion, and authorizes notice, rather than requiring service.

Under the foregoing authority, USAF received proper notice of Debtors' Objection and elected to do nothing.

Second, the Court finds little merit in Ruth Hankins' assertion that USAF did not receive

the Court's Notice of Hearing. As explained by one court:

> In the Ninth Circuit, a declaration that the designated party did not receive the mailed notice is, in itself, insufficient to rebut the presumption of receipt. In order for the presumption to be rebutted, "something more than a mere declaration of a creditor alleging non-receipt is required." *In re De la Cruz*, 176 B.R. at 22; *In re Carter*, 511 F.2d 1203 (9th Cir.1975). (concluding that the mailing presumption was rebutted when the notice sent by certified mail was returned unclaimed).

U.S. v. Castro, 243 B.R. 380, 383 (D. Ariz. 1999).

As noted earlier by this Court, the Notice of Hearing sent to USAF was not returned unclaimed or undeliverable. Consequently, even though USAF may have a meritorious defense to Debtors' Objection, the Court concludes that USAF's Motion for Reconsideration must be denied. USAF had too many opportunities in this case to oppose Debtors' objection, and they did nothing. A party cannot sit on its rights and then, when the time is convenient, seek to overturn an order of this court. As explained by the Ninth Circuit Court of Appeals in *Smith v. Stone, supra*, chaos would result. Therefore, consistent with the foregoing, the Court will, contemporaneously herewith, file an Order as follows:

IT IS ORDERED the Motion for Reconsideration of Claims under F.R.B.P. 3008 filed by United Student Aid Funds, Inc./Sallie Mae on September 20, 2005, is DENIED.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana